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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

NO. [redacted] 205

TENNESSEE VALLEY SAND & GRAVEL COMPANY,
Petitioner,

versus

BOBBY JOE CRAFTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Comes now Tennessee Valley Sand & Gravel Company, petitioner, and respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the judgment of the United States District Court for the Northern District of Alabama, Northwestern Division, in favor of respondent and against petitioner.

OPINIONS BELOW

The opinions of the District Court and of the Court of Appeals for the Fifth Circuit are not reported. Both opinions are reproduced in the Appendix hereto as Appendix A and B respectively.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 11, 1969. The mandate has been stayed pending the filing of this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether the District Court and the Court of Appeals misapplied the decision of this Court in *Braen v. Pfeifer Oil & Transport Co.*, 361 U.S. 129, 80 S. Ct. 247 (1959) and created a "new frontier" of Jones Act coverage to the effect that once it has been established that an employee is a seaman, that status continues throughout the period of his employment regardless of the activity in which he is engaged at the time of his injury.

STATEMENT OF THE CASE

On March 8, 1967, respondent, Bobby Joe Crafton, an employee of petitioner, Tennessee Valley Sand & Gravel Company, sustained personal injuries while engaged in ship construction work on an uncompleted dredge. He had previously been employed by petitioner aboard an operational dredge and its tender. Although he initially accepted benefits under the provisions of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901, he subsequently filed suit in Admiralty, in the United States District Court for the Northern District of Alabama, Northwestern Division, claiming that at the time of his injury, he was a seaman, and as such, entitled to seek recovery under the provisions of the

Jones Act, 46 U.S.C. §688. Petitioner contested respondent's claimed status under the Jones Act and urged that his exclusive remedy was under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Respondent abandoned his suit in Admiralty and requested and was granted a trial by jury. By stipulation, the primary issue of the status of the respondent was tried to the Court alone and the District Court concluded that the respondent, at the time he sustained injury, was a seaman "within the purview of the Jones Act". Before the matter was submitted to the jury on the issue of damages, the parties stipulated liability and the extent of repondent's damages. A directed verdict in favor of the respondent was entered in the amount of $13,000.00. Petitioner appealed only with respect to the status of respondent and this petition is likewise addressed to that single issue—whether respondent was a seaman at the time of his injury.

The material facts upon which both the District Court and the Court of Appeals based their opinions are not in dispute and are as follows:

Petitioner, an Alabama corporation, is engaged in the business of dredging sand and gravel, processing same, and selling it wholesale. Petitioner owned and operated the Dredge McCULLOUGH, the Dredge Tender EMMA COFFEY, and a number of barges which were engaged in dredging sand and gravel from the Tennessee River near Wolf Island, which was then supplied to the petitioner's plants in Sheffield and Spruce Pines, Alabama, for processing. Petitioner decided to construct a new dredge to replace the Dredge McCULLOUGH and accordingly had four small sand barges welded together

to form a single hull. The welding operation was performed by Ingalls Iron Works at Decatur, Alabama, and the hull was then towed to the Sheffield City Dock where petitioner undertook to complete the construction of the dredge, using its own personnel. Petitioner was required to erect the superstructure and install all of the dredging machinery. This work by petitioner commenced on September 1, 1966, and was not completed until May 8 of 1968. At the time of respondent's accident on March 8, 1967, the new dredge was not complete and was incapable of functioning as a dredge although it was, at all times, afloat and capable of being towed.

In June of 1965, respondent, Crafton, was first employed by petitioner as a laborer and assigned to the Dredge McCULLOUGH. He also performed duties on the Dredge Tender EMMA COFFEY. It was conceded by petitioner that while employed aboard the Dredge McCULLOUGH or EMMA COFFEY, respondent was a seaman.

In March of 1967, business was slack and it was decided to operate the McCULLOUGH with only one shift. Respondent's shift was scheduled to be off (for which respondent would receive no pay) and his shift was given the option of working on the new dredge or staying off with no pay. Respondent and two members of his shift agreed to work on the new dredge for a period of one week at which time they were to return to the Dredge McCULLOUGH and the other shift would go off.

Respondent worked on the new dredge for some six days prior to his injury, traveling by car each day

from Savannah to Sheffield and back. During the period of his work on the new dredge, the Dredge McCULLOUGH and the EMMA COFFEY were dredging in the Tennessee River in the vicinity of Wolf Island, some four miles from respondent's home in Savannah, Tennessee, while the new dredge was some seventy miles away. Respondent traveled by car each day from Savannah to Sheffield and back. His work aboard the new dredge consisted of various phases of the construction process and he was admittedly so engaged at the time of his injury. The work being performed by the Dredge McCULLOUGH and EMMA COFFEY seventy miles away was completely unrelated to the work being performed on the new dredge. It was established that petitioner kept separate time records and cards for the work on the new dredge as opposed to the regular work on the Dredge McCULLOUGH.

REASONS FOR GRANTING THE WRIT

It cannot be seriously disputed that respondent, Crafton, was not performing seaman's work at the time of his injury. Had his assignment to work on the new dredge been his first employment with petitioner, it is obvious that he could not be a seaman for it is well established that a worker aboard an uncompleted vessel is not a seaman and member of the crew of that vessel, *Frankel v. Bethlehem-Fairfield Shipyard*, 132 F. 2d 634 (CA 4, 1943), *cert. denied*, 319 U.S. 746, 73 S. Ct. 1030 (1943); *Alfred v. M/V MARGARET LYKES*, 398 F. 2d 684 (CA 5, 1968); *Edelman, Maritime Injury and Death*, Page 76; and *Norris, The Law of Seamen*, Page 809. Notwithstanding these facts, the District Court concluded that respondent was a seaman "acting in the course of his employment as a member of the

crews of the EMMA COFFEY and the McCULLOUGH in preparing the 'new dredge' for use therewith" (Ap. A-5). The Court of Appeals, in a summary proceeding without oral argument, rendered a Per Curiam opinion sustaining the District Court's conclusion.

Although petitioner recognizes the recent expansion of the scope of Jones Act coverage, both as to the type of individuals covered by the Act and as to the activities being performed by employees enjoying the status of seaman, it strenuously urges that no case has expanded the scope of the Jones Act to the limits now laid down by the lower Court. The majority opinion of this Court in *Braen v. Pfeifer Oil & Transport Co.*, 361 U.S. 129, 80 S .Ct. 247 (1959), is cited by both the District Court and the Court of Appeals as dispositive of respondent's status here. Both lower Courts, we submit, have misinterpreted this Court's opinion in *Braen* and have extended Jones Act coverage to an area of employment and activities not heretofore covered or contemplated by any decision of this Court. This Court's opinion in *Braen*, we submit, stands for the proposition that if an employee is a seaman at the time of his injury and he is injured in the course and scope of his employment, he is within the coverage of the Jones Act even though his work assignment at the time of his injury is not aboard his ship and is not in the service of that ship. Both the District Court and the Court of Appeals apparently interpret the Court's opinion in *Braen* as standing for the proposition that "once a seaman, always a seaman" regardless of the nature of the work being done by the employee at the time of the accident. This Court in *Braen*, we submit, did not so decide and to the contrary, specifically stated that where the status

of the employee at the time of the accident is in dispute, the work being done by the employee at the time of his injury may be crucial in determining his status. It is this aspect of this Court's opinion in *Braen* which, we submit, the lower Courts have failed to follow.

Neither Court below apparently felt that the nature of the work being done by the respondent at the time of injury was important in determining respondent's status. In so doing, the Lower Courts, we submit, have not only failed to follow this Court's opinion in *Braen* but have expanded the scope of Jones Act coverage beyond all reasonable limits. The opinions in this case, if carried to its logical conclusion, would mean, at the least, that any seaman who was thereafter offered a "temporary" assignment by his employer in any land base capacity, whether as a typist, a grass cutter, or a welder, would remain a seaman since his non-seaman's work was only temporary and he was in the course and scope of his employment at the time of his injury. Even more sweeping, of course, is the fact that the opinions below are not clearly limited to "temporary assignments" and may encompass permanent non-seaman's work for the same employer. Further, the opinions in this case will require every Deputy Commissioner, in any Longshoremen's and Harbor Workers' Act proceeding, to inquire into the work previously performed by the injured employee, for if any injured claimant had previously been employed by the employer as a seaman, he may well still be a seaman.

The time honored phrase "service of the ship" is not completely without meaning, and where a seaman undertakes entirely different duties for the same employer,

he should be considered as having undertaken a second job and the status of a seaman should not follow to all subsequent phases of employment with that employer. To hold otherwise, as did the lower Courts, is to put no effective limitation upon an employee's status as a seaman.

Obviously, there are serious economic considerations, both from an employer's and an employee's point of view, which require clarification of the scope of Jones Act coverage to non-seamen activities. Both the employer and employee should know, within reasonable limits, the status of any particular employee. From the employee's point of view, there may well be situations in which a "seaman" doing non-seaman's work, may be solely responsible for his own injury and thus not entitled to recovery under the provisions of the Jones Act. Should he then be deprived of his remedy under the Compensation Statute? "Once a seaman—always a seaman" is not and cannot be the law and we urge this Court to set to rest the questions raised by the sharply divided Court in *Braen* and to clearly establish guide lines which the lower Courts may follow in the future, to effectively determine status issues in similar cases.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue herein to the end that the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the above and foregoing petition for a writ of certiorari has been duly served on Howell T. Heflin, Esq. of Heflin & Rosser, attorney for respondent, by depositing same in the United States mail, postage prepaid, addressed to him at Post Office Box 496, Tuscumbia, Alabama.

New Orleans, Louisiana, this day of June, 1969.

APPENDIX A

MEMORANDUM OPINION

(Number and title omitted) (Filed: July 1, 1968)

When this case was called for trial in Florence, Alabama, on May 22, 1968, the attorneys of record for the respective parties stipulated that the issues as to whether plaintiff was a "seaman" within the purview of the Jones Act, 46 U.S.C.A. §688, when he sustained severe personal injuries on March 8, 1967, might be tried to the court without the intervention of a jury and that in the event that the court determined that he was entitled to proceed under such act, the issue of damages would forthwith be submitted to a jury.

After consideration of the evidence, which is summarized hereinbelow, the court announced from the bench its conclusion that plaintiff was a "seaman" on the occasion of his injuries. Whereupon it was stipulated by counsel that a jury might be impaneled and instructed to return a verdict in favor of the plaintiff and against the defendant in the amount of thirteen thousand dollars, without prejudice to and with full reservation of the right of the defendant to appeal from the judgment of the court that plaintiff was entitled to his remedy under the Jones Act. Thereafter, a jury returned a verdict in favor of the plaintiff in the amount of thirteen thousand dollars, upon which the court will contemporaneously herewith enter final judgment.

Prior to March 8, 1967, plaintiff has been employed by defendant for approximately a year and a half as a deckhand or laborer on two of its vessels. Plaintiff's

duties on such vessels, one a dredge known as the McCULLOUGH, and the other a motor vessel, the EMMA COFFEY, entailed practically every function of keeping these vessels in navigation upon the Tennessee River. He spent approximately fifty per cent of his time on the McCULLOUGH which was used during the period of his employment in and about an area of the Tennessee River known as "Wolf Island", approximately twelve miles east of Pickwick Dam, where its dredging equipment was utilized in the removal of sand and gravel from the bottom of the river. Such sand and gravel placed in barges and were towed from the McCULLOUGH by the dredge tender, EMMA COFFEY, to the north bank of the Tennessee River, or to other locations where they would be secured to other tow vessels and transported to various docks on the Tennessee River.

Plaintiff's daily duties required him to spend the remaining fifty per cent of his working time on the EMMA COFFEY. On both the EMMA COFFEY and the McCULLOUGH he would clean the decks, splice ropes, inspect for leaks, clean the walkways and passageways, tie the vessels to vessels and barges, store supplies, and, in general, keep the vessel in "ship-shape". On the EMMA COFFEY he would repair leaks with cypress shingles which would vulcanize the leaks by swelling. He frequently piloted the EMMA COFFEY, changed the oil and fuel filters on its engines and made occasional soundings. Thus, whether classified or labeled as a laborer or a deckhand, he regularly performed the duties to both vessels which are customarily performed by a "seaman" on inland navigable rivers.

On March 8, 1968, when he sustained the injuries upon which this action was founded, he had been tem-

porarily assigned to the "new dredge" at the Sheffield Docks which had been leased to defendant, whereupon dredging equipment was being placed. This vessel had been constructed by the Ingalls Shipbuilding Company by welding four barges into a single vessel. Each of such barges had had a long history of navigation on the Tennessee River. After completion of the welding, the "new dredge" had been towed from Decatur to Sheffield on the waters of the Tennessee River. Insofar as navigability was concerned it had been fully completed. While the dredging equipment was being installed thereon it was moved from time to time on the waters of the Tennessee River either by the use of a crane or a tow vessel to make room for the loading and unloading of barges at the Sheffield Docks. It was never placed in dry dock.

While Plaintiff was performing temporary duties on the "new dredge" for a period of from three to six days, it had twice been moved with the aid and assistance of plaintiff, once with a crane and once by a tow boat.

Defendant conceded that plaintiff was a "seaman" and a member of the crew while performing his duties on the McCULLOUGH and the EMMA COFFEY, but contended that his duties were those of a shipbuilder while temporarily assigned to the "new dredge". The basic insistance of the defendant was that he was rendering no service to either the McCULLOUGH or the EMMA COFFEY at the time he received his injuries and that, therefore, his exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act. This contention overlooks the fact that the dredging operations of these vessels were sporadic; that at frequent intervals there was occasions for employing two shifts while at other times there was employment afforded only to a single

shift and the members of the crews were paid only for the time actually worked. It was in the interest of defendant to maintain the integrity of the members of the crews on both ships by assigning idle seamen to other work in its employment. Plaintiff was injured while so engaged. Moreover, the "new dredge," when the installation of its equipment was completed, was intended for the same use as the McCULLOUGH. Thus viewed, plaintiff was a "seaman" acting in the course of his employment as a member of the crews of the EMMA COFFEY and the McCULLOUGH in preparing the "new dredge" for use therewith.

Through the years the courts have greatly expanded the area in which a seaman may be engaged and still remain in the service of his ship. In fact, the test now in vogue has lost any description suggestive of nautical lore by resort to the terrestrially developed phrase, "in the course of his employment." *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966); *Braen v. Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129 (1959); *Magnolia Towing Co. v. Pace*, 378 F.2d 12 (5th Cir. 1967); *Tyndall v. Conduit & Foundation Corp.*, 169 F.Supp. 299 (E.D. Pa. 1959). *Compare, Bulter v. Whiteman*, 356 U.S. 217 (1958) and *Bodden v. Coordinated Caribbean Transport, Inc.*, 369 F.2d 273 (5th Cir. 1966).

The court finds peculiarly applicable the following language of J. Skelly Wright in *Williams v. Milwhite Sales Co.*, 197 F.Supp. 730 (E.D. La. 1961):

> ". . . The fact that a claimant was working ashore at the time of the accident is not decisive, nor is the fact that the claimant at the time of his injury was assigned to duties unrelated to

his vessel. In determining Jones Act coverage the initial inquiry, of course, is whether the plaintiff was employed as a member of a crew of a vessel. Once this is established, any injury suffered in the course of employment is covered irrespective of the place or the nature of the work being performed at the time."

197 F.Supp. at page 732.

It was conceded by defendant, indeed as it must be under the decided cases, that the filing of a claim by plaintiff under the Longshoremen's and Harbor Workers' Compensation Act which had not proceeded to a hearing before the Deputy Commissioner would not support the defense of estoppel or bar.

This the 28th day of June, 1968.

SEAL

s/Seybourn H. Lynn
Chief Judge

JUDGEMENT

(Number and title omitted) (Filed: July 1, 1968)

In conformity with the memorandum of the court contemporaneously filed herewith:

It is ORDERED, ADJUDGED and DECREED by the court that on March 8, 1967, when he sustained his injuries, plaintiff was a seaman within the purview of the Jones Act, 46 U.S.C.A. §688.

It is further ORDERED, ADJUDGED and DECREED that plaintiff, Bobby Joe Crafton, have and recover of defendant, Tennessee Valley Sand & Gravel Company, a corporation, the sum of Thirteen Thousand Dollars ($13,000.00), together with the costs of court incurred herein, for which, unless presently paid, execution may issue.

Done, this the 28th day of June, 1968.

SEAL

s Seybourn H. Lynne
CHIEF JUDGE

NOTE: VARIOUS DOCUMENTS OMMITTED—
FILED IN ITS ORIGINAL FORM.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26833
Summary Calendar

BOBBY JOE CRAFTON,
Plaintiff-Appellee,

versus

TENNESSEE VALLEY SAND & GRAVEL COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Alabama.

(March 11, 1969)

PER CURIAM: Pursuant to Rule 18 of the Rules of the Court, this case has been placed on the summary calendar for disposition without oral argument.[1]

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1. In order to establish a docket control procedure, the Fifth Circuit adopted new Rules 17-20 on December 6, 1968. See *Wittner v. United States*, 5 Cir., 1969, ——— F.2d ——— (No. 25,781, slip opinion dated January 23, 1969), Fn 1 and Appendix thereto.

2. CRAFTON V. TENN. VAL. SAND & GRAV. CO.

Crafton brought suit under the Jones Act, 48 USCA, § 688. The district court found that he was a "seaman" acting in the course of his employment as a member of the crews of the Dredge Emma Coffey and the Dredge McCullough when he was injured while temporarily assigned to a newly constructed dredge being prepared for use by his employer.

Since recovery under the Jones Act is predicated on the injury taking place "in the course of employment", the exact place of injury is not controlling. *Magnolia Towing Company v. Pace*, 5 Cir., 1967, 378 F.2d 12. The only requirement is that the seaman be "doing the work of his employer pursuant to his employer's orders." *Braen v. Pfeifer Oil Transportation Company*, 1959, 361 U.S. 129, 133, 80 S.Ct. 247, 4 L.Ed.2d 191. This presupposes that the injured person is a seaman within the meaning of the Act. The sole issue here, as it was in the district court, is whether Crafton was a seaman. The conclusion of the district court that he was at the time of his injury is sustained by the underlying facts. The findings are not clearly erroneous. There the matter ends.

AFFIRMED.